



## Supreme Court Decision Making

### *Deciding Which Cases to Hear*

Each year, the Supreme Court is asked to hear approximately five thousand cases. However, because of time and resource constraints and because not all cases are of equal merit, the Court selects only a handful to formally review.

When formal appeals are filed before the Supreme Court, legal briefs outlining the reasons behind the appeals are circulated among the Justices who sit on the Court. Justices then compile and circulate a "Discuss List" of cases that might warrant Supreme Court review. Finally, the Justices meet and vote on which cases to hear. The Court uses an informal "Rule of Four" in deciding whether or not to hear a case--only four of the nine Justices need to vote to hear a case. Through this process, the Court chooses 150 to 200 cases to hear each year.

As they narrow the number of cases on the "Discuss List," the Justices use several standards to determine whether or not a case is "justiciable." First and foremost, the Court must decide if it has jurisdiction in a case. If it does not, it will not hear the case. The Court has heard less than 200 original jurisdiction cases in its entire history. The Court will also generally refuse to rule on "political questions," cases that it believes are better addressed through the regular political process by other branches of government. Cases in which no real controversy or dispute exists will also be rejected by the Court--it will not address hypothetical questions. Similarly, the person or persons who bring cases before the Court must have "standing." They must be able to show that they have sustained "injury in fact," i.e. that they have been harmed in some real way. An individual who knows someone who is wrongfully imprisoned does not have standing to sue for his or her release (the imprisoned individual would have standing).



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Once the Supreme Court has decided to hear a case, it orders lower courts that have handled the case to surrender all records and supporting documents related to it. As an appeals court, the Supreme Court does not convene new jury trials but rather reviews the decisions of lower court judges and juries.

As the Justices on the Court begin to weigh the merits of the cases that come before them, attorneys on both sides of the case present oral arguments in the Supreme Court chamber. These sessions are open to the public and are the most visible phase of the Court's decision-making process. Oral arguments, however, are rarely the deciding factor in the Court's decisions. Much more important are the legal briefs filed by each side as well as numerous "friend of the court" briefs filed by interested parties who want the Court to consider particular aspects or ramifications of the case.

Of even greater importance, however, are previous decisions of the Court. To maintain its consistency and credibility, the Court regularly refers to previous Supreme Court decisions as it considers new cases. Adhering to a standard of *stare decisis*, or letting previous decisions stand, the Court is very reluctant to reverse or even stray from the precedents it has established in past cases. The Court will, however, on very rare occasions, reverse previous Supreme Court decisions when it sees no alternative but to reject a "bad" or outdated decision.<sup>1</sup>

As they sort through these numerous legal briefs and the original trial and appeals court records, the Justices engage in private debate, argument and discussion. Once a fairly clear majority emerges in support of one side or the other in a case, a Justice (or Justices) writes and circulates "draft" opinions, or explanations of the Court's decision. Ultimately, a majority of the Court (five or more Justices) decides the outcome of the case and a final opinion is written and announced to the public.

### *Types of Opinions*

When the Supreme Court announces its decisions, the particular outcome in a particular case is often of only secondary importance. Far more important are the implications of the Court's decision in that case for a host of other similar cases and controversies. The extent of the applicability of the Court's decision in a particular case to other cases is usually spelled out in detail in the Court's opinion.

The most important document that accompanies a Supreme Court decision is the "Majority Opinion" of the Court which outlines the legal precedent and logic behind its decision. In some instances, one or more of the Justices in the minority may feel so strongly opposed to the majority's decision that they will write a "Dissenting Opinion." Justices who agree with the majority's decision but for other reasons might also write an additional opinion, a "Concurring Opinion." The Justice or Justices who write opinions for the Court generally affix their names to them, thereby giving the public and the legal community some insight into the thinking of individual justices. In rare instances when the Court rules unanimously on a case that it believes requires little explanation, it will issue a short "Per Curiam" opinion, or an opinion "for the Court," with no name attached to it.

### ***Do Courts Make Laws?***

When the Supreme Court announces its decisions and issues its opinions, it is often accused of "legislating from the bench" or making laws although it is not the legislative branch. Does the Court "make law" when it decides the outcomes of the cases that come before it? The answer depends on the definition of "law" one uses. When the Congress, a state legislature or some other established law-making body passes a law, it creates "statutory law." These are the laws with which people are most familiar, such as laws regulating the speed limit, laws that define criminal behavior and the laws that establish government programs. Statutory laws, however, are not the only kinds of laws that are "made" and applied in the American political and legal systems.

The most fundamental laws of this nation are the guidelines established by the Constitution. The "constitutional law" of the land includes the Constitution's descriptions of the relationships between the three branches of the national government, the relationships between the national and state governments, the powers the Constitution grants to the national government and, most importantly, the limitations it places on governmental action.

The Legislative, Executive and Judiciary branches are all established and guided by constitutional law. However, the Constitution is sufficiently vague that each branch has frequently found itself in situations where the "right" course of action under constitutional law was unclear. The Framers of the Constitution, recognizing that they could not anticipate every possible circumstance in the new nation's future, purposely left room for each branch to adapt and interpret their roles under the Constitution to meet the needs and challenges they would face. Most notably, the Congress was given the task of deciding what was "necessary and proper" to "promote the general welfare" and form "a more perfect union." The necessary product of these decisions has been thousands and thousands of statutory laws.

As the Executive Branch has implemented the statutory laws passed by the Congress, it has also had to interpret not only its role under the Constitution but also the intentions of the Congress. In many instances the Congress has passed legislation that was purposely vague, leaving the details to Executive Branch departments and agencies to decide. When bureaucracies determine the details of the enforcement and implementation of a law passed by the Congress, the Executive Branch also "makes law." These kinds of laws are called "administrative law."

As this nation's political system has evolved and matured, there have been numerous controversies about the laws passed by the Congress and the way those laws have been implemented by the President and the Executive Branch. There have also been disputes about the separation of powers between the three branches, the relationship between the national government and the states, the rights of the people and a host of other questions that arise under the Constitution. When such cases arise, they clearly fall under the jurisdiction of the Supreme Court. As Alexander Hamilton observed, it was necessary for the stability and future of the nation to "establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice" (see *The Federalist No. 22*). When the Court makes decisions in response to such cases, it is, for all intents and purposes, defining and interpreting constitutional law. Does it "make" constitutional law in the process? There are differences of opinion on this matter, but the Court has clearly gone beyond the strict "letter of the law" embodied in the Constitution in several instances. Whether its decisions amount to new law or merely interpretations and clarifications of existing ones is, for better or worse, a matter of opinion.

From Hamilton's statements in *The Federalist Papers*, however, it appears that the Framers at least intended that the Supreme Court would stand between the other two branches of the national government and the people, preventing

abuses of power and improper interpretations of the Constitution. Indeed, Hamilton declared it the duty of the Court to "declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."<sup>2</sup>

### ***Interpretation as law***

A prominent attorney who had argued hundreds of cases before the Supreme Court once remarked that the Supreme Court is not final because it's right, it is right because it is final. The Court's position as the court of last appeal and as the highest court in the land means that its decisions are binding and largely unchangeable. Once the Court has ruled, its decisions have all the effect and permanency of law.

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### **NOTES**

1. For a list of Supreme Court Decisions that have overturned previous Supreme Court Decisions, see "[Supreme Court Decisions Overruled by Subsequent Decisions](#)."
2. For a discussion of the Court's most famous assertion of its right to review and determine the constitutionality of congressional enactments, see "[Marbury v. Madison](#)" in the section on "[Implementation & Interpretation](#)" of the Constitution.

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